Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1979

Nos. 79-1708, 79-1716, 79-1718

STATE OF NEW YORK,
Petitioner in No. 79-1708,

S. & E. SHIPPING CORPORATION,
Petitioner in No. 79-1716,

SEAFARERS INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO,
Petitioner in No. 79-1718,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,
Respondents,

and

PENNSYLVANIA PUBLIC UTILITIES COMMISSION, CONSOLIDATED RAIL CORPORATION, SOO LINE RAILROAD COMPANY and CONAGRA, INCORPORATED,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF CONSOLIDATED RAIL CORPORATION IN OPPOSITION TO THE PETITIONS FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Are the requirements of Section 3(4) satisfied when the railroad assesses equal charges as between inbound modes of transportation at each common junction point.

STATEMENT OF THE CASE

Roughly seven years ago, two railroads, Soo Line and Erie-Lackawanna, now Consolidated Rail Corporation (Conrail), established certain all-rail rates for the transportation of wheat from the Twin Cities area to Martins Creek, Pennsylvania. The establishment of the rates followed the installation of milling facilities by Conagra, Inc. at Martins Creek. For many years, the Buffalo milling interests have had the best of all possible worlds. There were no flour milling facilities to the east thereof, and they had ready access to inbound wheat by rail, water and truck. They had, in short, a virtual monopoly in the trade. Martins Creek, however, is much closer than Buffalo to the flour buyers in the major population centers on the East Coast, and the operation of a flour mill at that point constituted a competitive affront to the flour milling industry at Buffalo, as well as to the lake carriers and Buffalo port interests who regarded the eastbound traffic as their private preserve.

Conagra had no milling or storage facilities for wheat at Buffalo. Rather, it was wholly dependent for such services upon its Buffalo competitors. Small wonder that it sought alternative means of distributing flour at lower prices to the East Coast bakeries. Less wonder that the Buffalo milling interests—accompanied by lake carriers serving Buffalo and, eventually, the State of New York (New York)—would resort to litigation in an effort to forestall Conagra's competitive move.

After an investigation of petitioners' complaints against the all-rail movement from the Twin Cities, the Commission concluded that the petitioners had failed to sustain a case of undue discrimination under former Section 3(1) (49 U.S.C. 10741(b)) and that the unregulated lake carriers were not "connecting carriers" entitled to protection from discrimination under former Section 3(4)

(49 U.S.C. 10701(c)). The first opinion of the Second Circuit sustained the Commission's opinion as to Section 3(1), but, concluding that at least some of the lake carriers, although "unregulated" in the transportation of wheat, were nevertheless "certificated" under Part III of the Act and thus "connecting carriers" under Section 3(4), the Court remanded the subject to the Commission for a determination as to whether a violation of Section 3(4) existed.[1]

The thrust of the 3(4) complaint was that Conrail's Buffalo-Martins Creek rate was the only rate available to the lake carrier in lake-rail transportation from the Twin Cities to Martins Creek, whereas Conrail also participated in an all-rail rate with the Soo Line to Martins Creek via Chicago wherein Conrail accepted a lower rate (division), mile for mile, than it assessed on ex-Buffalo movements. While Conrail's ex-Buffalo rate was available to all traffic regardless of inbound mode of carriage, its ex-Chicago division was not initially open to inbound lake wheat at Chicago.

Since the gravamen lay in the alleged nonavailability of the ex-Chicago division to inbound lake traffic at that point, Conrail offered to the lake carriers the same ex-Chicago arrangement then and now available on inbound ex-Soo Line traffic at the same junction. The Commission thereupon observed that:

> "Since it appears that ConRail now stands ready and willing upon request, to handle ex-lake traffic from Chicago on the same basis as it now handles ex-rail traffic from Chicago, there appears to be no violation of Section 3(4) of the Act." (A-43).

The court below sustained the Commission.

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1. Contrary to petitioner New York (p. 6), the Second Circuit did not find that Section 3(4) discrimination existed. See A-22 (Petitioner's Appendix, p. 22).

REASONS FOR DENYING THE PETITIONS FOR A WRIT OF CERTIORARI

I

Petitioners Misstate the Question Presented to This Court

One might well ask why petitioners pursue this litigation in view of Conrail's standing offer to transport ex-lake wheat from Chicago to Martins Creek on the same conditions and at the same rate (division) which it now assesses against ex-Soo Line wheat for the same movement. Given that circumstance, ex-lake wheat stands on precisely the same footing as ex-rail wheat, whether it is tendered to Conrail at Buffalo or at Chicago. As the court below noted, the water carrier may "prefer" Buffalo over Chicago (A-51, Ft. 4), but Section 3(4) requires only that Conrail provide equality at each junction point; it does not require deference to the connecting carrier's preferences.

The answer to the inquiry posed above is that the end result sought by petitioners is not equality of rates between connecting lake and rail carriers, but rather the elimination of the all-rail rate from the Twin Cities to Martins Creek. Only that result would suitably impair—if not altogether eliminate—all-rail competition during the summer, the new Conagra milling operation and the promise of lower prices on flour to the East Coast baking industry.[2]

For that reason, petitioners' questions are couched in terms of alleged unlawfulness of the "all-rail rate" from the Twin Cities vis-a-vis the rail leg of the lake-rail move via Buffalo, thus blurring the distinction between charges of unlawfulness under Sections 1 (49 U.S.C. § 10701(a))

2. In fact, petitioner Seafarers International Union requests this Court to cancel the all-rail rates (p. 13).

and 3(1), on the one hand, and Section 3(4) on the other. For example, New York's question to the Court is addressed to "a disparity in freight rates between carrying wheat on *all-rail rates* and carrying wheat from a connecting lake carrier" (p. 2), and S&E's question is "whether the railroad *unit train rates* in issue discriminate unlawfully against Great Lakes water carriers . . . as connecting carriers at Buffalo, New York in water rail competition for carrying wheat from the north central states" (p. 2). These would be appropriate questions if the issues before the Court involved reasonableness under Section 1 or discrimination as between places, persons or ports under Section 3(1). The Commission, however, decided these very issues adversely to the petitioners, and the agency's opinion therein was sustained by the court below, except with respect to the question of "connecting carriers" under 3(4). The lawfulness of the all-rail rates therefore is not in issue here.

The distinction between a 3(1) and a 3(4) complaint is easily grasped by using a parallel hypothetical. Assume that the same all-rail rate from the Twin Cities to Martins Creek were provided by Soo Line in single line service and that Conrail's only participation lay in the movement from Buffalo to Martins Creek. The competitive situation of Conagra vis-a-vis the Buffalo millers would be exactly as it is today, but this litigation would be over. While petitioners may have assailed the Soo Line's all-rail rate under former Sections 1 and 3(1), there would be no basis whatsoever for a Section 3(4) allegation predicated upon a disparity in treatment between connecting carriers, since the Soo Line movement would not involve any connections and Conrail's ex-Buffalo rate applies regardless of inbound mode.

It is only because of Conrail's participation in the all-rail rate and its connection with Soo Line at Chicago

that enabled petitioners to raise the 3(4) issue before the Commission, and, in sharp contrast to petitioners' arguments with respect to the "all-rail" rates here, their contentions before the Commission were expressly directed to a comparison between Conrail's earnings from its ex-Chicago division of the all-rail rate vis-a-vis its earnings from its ex-Buffalo rates.

For example, in its Supplemental Opening Argument filed with the Commission, New York described the discrimination complained of as:

> "the disparity between the rail rate applicable to the intermodal route from Buffalo to Martins Creek when compared to the rail rate applicable *to that portion of the all-rail route from Chicago to Martins Creek.*" (JA, p. 21)[3],

and its brief to the court below spelled out the 3(4) grievance with this:

> "In short, Conrail still charges twice as much to transport 100 pounds of wheat one mile when it connects with a water carrier at Buffalo than when it connects with another railroad [at Chicago]."

S&E's presentation reflected the same premise:

> [a demand for] "a disproportionately higher charge for grain ex-lake carriers *than . . . for the Erie portion of the all-rail proposed rate.*" (JA, pp. 58-59)

And this is exactly the context in which the Commission considered the issue:

> "In support of their allegation the unit train rates to Martins Creek unjustly discriminate against connect-

3. JA refers to the Joint Appendix filed with the Court of Appeals.

> ing lake carriers at Buffalo, the protestants have shown a difference in Conrail's *divisions of revenue* as between the Chicago and Buffalo movements . . ." (A 40)

Petitioners' views above as to the offending disparity, of course, were expressed prior to the point at which Conrail issued its standing offer to place the lake carriers on an equal footing with the Soo Line at Chicago. With that offer, any disparity in ex-rail versus ex-water charges disappeared. Hence, the imprecise nature of petitioners' "Questions" to this Court, which, in turn, permits them—at least as they see it—to indulge in the lurid prose which normally attends the subject of "destructive competition," in this case, the imminent demise of lake carriage and the Buffalo milling industry with substantial, if not fatal, injury to the Empire State.

Charges of this nature, however, are not relevant in a 3(4) dispute. *Mechling, infra,* views 3(4) as requiring equality, regardless of consequence. The duty of the responding carrier ends when equal opportunity has been provided. In this instance, Conrail has left the choice of junction point to the lake carrier, which, in turn, is assured that whatever the choice, its traffic will move via Conrail beyond the junction point selected to Martins Creek on the same basis available to the traffic handled by the competing inbound rail carrier. Whatever "inherent advantage" is held by the lake carrier on the water movement to either Chicago or Buffalo will remain intact.

Having brought the issue into precise focus, application of the case law is simple.

II

Rates Which Differ Between Common Junction Points But Which Are the Same From Each Junction Point Regardless of the Inbound Mode Do Not Violate Section 3(4) of the Act

The decisions cited broadly by petitioners are those generally recognized as established precedent in cases of alleged discrimination between connecting carriers at common and non-common junction points, *Mechling*,[4] *Arrow*,[5] *Western Pacific*,[6] *Seatrain*,[7] and *Rock Island*,[8] but a careful review of these opinions discloses only that Conrail has complied fully with all of the conditions therein imposed.

In this instance, there are two separate junction points, Buffalo and Chicago, each of which is common to both rail and lake inbound carriers. The rate from Buffalo to Martins Creek was established well before the publication of the contested all-rail adjustment. It applies equally on all ex-Buffalo traffic, regardless of inbound mode, and is not in issue here, except as it became petitioners' predicate for the Section 3(4) allegation. The gist of the complaint is that while Conrail's ex-Chicago *division* out of the through all-rail rate is higher than the *rate* it maintains from Buffalo to the same destination, it is relatively lower, distance considered, i.e., Conrail's earnings per car mile

4. *I.C.C. v. Mechling*, 330 U.S. 567 (1947).

5. *Arrow Transp. Co. v. United States*, 176 F. Supp. 411 (1959).

6. *Western Pacific R. Co. v. United States*, 382 U.S. 237 (1965); 263 F. Supp. 140 (1966).

7. *Seatrain Lines, Inc. v. United States*, 233 F. Supp. 199 (1964).

8. *Chicago, Rock Island & Pacific R. Co. v. United States*, 233 F. Supp. 381 (1964).

from Chicago to Martins Creek are lower than those accrued on the ex-Buffalo movement. From this, petitioners argue that since Conrail's division east of Chicago applied only in connection with the inbound Soo Line movement to that point, the lake carriers were discriminated against and deprived of their "inherent advantage" contrary to the National Transportation Policy. This approach conveniently ignores the fact that Conrail's standing offer to transport ex-lake grain from Chicago at the same rate—or division—which it assesses against ex-Soo Line traffic eliminates the disparity complained of and is in full accord with the law according to *Mechling*.

In the view of the *Mechling* court, the National Transportation Policy and Sections 2 and 3(4) of the Act:

> "flatly forbid the Commission to approve barge rates or barge-rail rates which do not preserve intact the inherent advantages of cheaper water transportation, but discriminate against water carriers and the goods they transport. Concretely, the provisions mean in this case that Chicago-to-the-East railroads cannot lawfully charge more for carrying ex-barge than for carrying ex-lake or ex-rail grains *to and from the same localities,* unless the eastern haul of the ex-barge grain costs the eastern railroads more to haul than does ex-rail or ex-lake grain." (330 U.S., p. 577).

Arrow is cited at length in *Rock Island*, and the following excerpt from the latter opinion is dispositive here:

> "In either event, the yardstick for measuring discrimination against ex-barge traffic is the compensation received by the outbound rail carrier on ex-rail traffic *from the same port to the same destination.*" (233 F. Supp., p. 384).

Conrail has applied that "yardstick" east of Chicago and east of Buffalo to both ex-rail and ex-lake inbound wheat for Martins Creek moving via either junction point.

The *Western Pacific* decisions are not in point here. They emphasize only that a direct connection is not necessary to establish standing as a "connecting carrier" under Section 3(4) and that the burden of justifying a difference in treatment between connecting lines lies with the carrier responsible for maintaining the difference. Given Conrail's standing offer to assess equal charges against both ex-rail and ex-lake traffic at either junction point, there is no difference in treatment requiring justification.

Unlike the case at bar, *Seatrain* involved a complaint against alleged discrimination between connecting water and rail carriers at non-common junction points. That question does not arise where, as here, each junction point is common to both inbound rail and barge and the rates beyond each junction point are the same regardless of the inbound mode.

CONCLUSION

Equal charges are available to wheat moving beyond either junction point to Martins Creek, regardless of the inbound mode utilized. Any inherent advantage by water remains intact. There remains no issue meriting the writ.

The petitions should be denied.

Respectfully submitted,

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